Supreme Court, U.S.
FILED
JAN 9 1992
OFFICE OF THE CLERK

NO. 91-944

In The Supreme Court of the United States October Term, 1991

COOPER ELECTRIC SUPPLY CO.
***and* RICHARD A. COOPER**

Petitioners,

vs.

LYNN MARTIN, *Secretary of Labor*, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND NATIONAL ASSOCIATION OF ELECTRICAL DISTRIBUTORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LOUIS R. MARCHESE
ROBERT W. BAKER
20 North Wacker Drive
Chicago, IL 60606
(312) 782-1829

Attorneys for Amicus Curiae

Of Counsel

HALFPENNY, HAHN, ROCHE & MARCHESE
20 North Wacker Drive
Chicago, IL 60606

ARMI
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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Association of Wholesaler-Distributors and the National Association of Electrical Distributors, with the consent of the parties, present this brief in support of petitioners.[1]

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 116 national wholesaler-distributor trade associations, 54 state and regional trade associations and some 2,000 individual wholesale-distribution

[1] Letters of Consent have been filed with the Clerk of the Court.

firms, representing in the aggregate, over 40,000 wholesale-distribution companies nationwide.

The National Association of Electrical Distributors (NAED) is a national trade association comprised of some 870 main house electrical distributors dealing in a full range of electrical products with over 3,900 outlets nationally representing approximately 75% of all electrical distributors in the U.S.

The wholesale-distribution industry, of which the electrical distribution segment forms an important part, is a unique and people-oriented industry. Wholesale-distribution is a critical link in the marketing chain with sales in the latest reporting year exceeding two trillion dollars. This large and significant industry employs approximately 5.8 million persons, all of whom are engaged in one form or another in performing the primary function of wholesale-distribution, the supply of the appropriate goods and services to customers when and where the goods are needed.

The industry depends significantly on highly trained, skillful and resourceful employees who are consistently called upon to exercise discretion and sound judgment. It utilizes the most modern technology available to effectively carry out its mission to serve the U.S. and the world marketplace with a system of distribution unequaled anywhere else.

The decisions of the courts below in this matter seriously threaten the continuing effective performance of these functions by arbitrarily relegating to an insignificant and unimportant status those persons in the wholesale-distribution industry who utilize the highest degree of skills and modern technology available to serve this vast marketplace. These decisions present legal issues that gravely threaten a U.S. industry that currently leads the way to increased national productivity. The decisions of the courts below totally ignore the unique role of the inside salesperson in the people-oriented, service-driven wholesale-distribution industry. Wholesaler-distributor inside salespersons negotiate on behalf of their employers, represent their companies to the customers and suppliers, and promote sales. They perform job functions that are directly related to the employer's management policies and general business operations.

The failure of the courts below to grasp the overwhelming and distinctive importance of the inside salesperson to the wholesale-distribution industry is reflected in their dismissal of the inside salesperson's efforts as "routine" and not of substantial importance. The implicit perception is that inside salespersons perform clerical duties that are on par with hourly paid telephone operators. This woeful misjudgment is out-of-step with business conduct in the modern era. The proliferation of electronic media — telephones, computers, and fax machines — has removed the need for the immediacy of personal contact. It is now possible and significantly more effective to wield administrative authority from inside the wholesale-distribution facility.

The preoccupation of the decisions below with the characterization of inside sales as a production activity is a radical departure from the realities of the job objectives and responsibilities required of wholesaler-distributor inside salespersons. The focus of the inside salesperson is squarely upon the administrative duties enumerated in the Department of Labor's interpretive regulations ("advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control" 29 CFR § 541.205(b)), and not upon the production process itself. The findings below that the inside salesperson's administrative responsibilities are not considered exempt if part of the production process is unreasonable, and inconsistent with the applicable regulations.

The parties herein are properly concerned with establishing their respective positions. Amici provide the means to gain the broad perspectives required for ultimate determination of this matter consistent with statutory interest.

I. INSIDE SALESPERSONS IN THE WHOLESALE-DISTRIBUTION INDUSTRY HAVE A UNIQUE ROLE THAT MEETS ALL OF THE REQUIREMENTS FOR ADMINISTRATIVE EXEMPTION FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

The decisions of the courts below fail to take appropriate cognizance of the unique job performance required of the inside salesperson in the wholesale-distribution industry. The measure

for exempt status is discretion and independent judgment, and not mobility. Inside salespersons of a wholesaler-distributor are accorded the same authority to conduct sales as the outside salesmen, and yet are dismissed by the court below as "routine functionaries" performing "routine selling efforts."[2] This perfunctory conclusion was made without inquiry into the custom and practices of the wholesale-distribution industry or the specific nature of the work of an inside salesperson for a wholesaler-distributor. Exemptions are to be applied after a detailed factual examination of the duties of the employee.[3] Moreover, the significant factor in evaluating the presence of discretion in an employee's work is the nature of the work itself.[4] No such analysis formed the basis of either of the opinions of the courts below.

The work of the wholesaler-distributor inside salesperson is directly related to the business operations of the wholesaler-distributor. It requires that certain degree of responsibility and judgment that provides the basis for the administrative exemption. To find otherwise will have an immediate and severe impact upon the wholesale-distribution industry. Wholesaler-distributors consider their inside salespersons to be responsible, judgmental, well-trained, highly paid and thus administrative employees exempt from the Fair Labor Standards Act (FLSA). If the findings below are upheld, these same employers will suddenly find themselves liable for reimbursement of overtime wages and possible civil fines. Such potential liability would have a substantial adverse economic effect upon the industry, and upon the public which it serves. It would also adversely impact on attracting and encouraging capable, motivated people to consider lifetime careers in wholesale-distribution. Rather than affirming such a debilitating outcome, this court should give full consideration to the demands of the wholesale-distribution industry and existing legal precedent.

Wholesaler-distributor inside salespersons are highly compensated company representatives who are under general

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[2] *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905-06 (3d Cir. 1991)

[3] *Walling v. General Industries Co.*, 330 U.S. 545 (1947)

[4] *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 288 (4th Cir. 1986)

supervision and who utilize the most modern technology available to them. Their work is non-manual. It involves the exercise of responsibility and judgment on a regular and recurring basis. It is a position that is of major importance to the business of sales and service at the wholesale-distribution level.

Wholesaler-distributor inside salespersons do not merely apply their acquired skills or make decisions of little consequence. They do and they must, in order to function properly and effectively, work directly with customers. The inside salesperson must be aware of the needs of customers and must have the product knowledge to advise which specific goods and services the company offers can respond to those needs. When questions arise concerning the quality of the product and its performance under different applications and varying situations, the answers require highly trained individuals in a customer service/sales support role. Discussions between inside salespersons and customers include maintenance matters, product information and product applications assistance, repair parts availability and service, the application of interchangeable and substitute parts and the interface of such parts with competitive products during operations.

If outside salespersons are characterized as professional in their relationships with the company and its customers, the inside salesperson must be considered even more so in his approach, technique and company/customer relationship. The inside salesperson has day-to-day contact with customers and can make relationships flourish or wither on the vine. Maximum levels of competency are needed at such a key position. The conduct of business by the inside salesperson in wholesale-distribution is the conduct of the business of the wholesaler-distributor. It is an important position demanding responsibility, judgment and discretion. Where these circumstances are present, the decisions have overwhelmingly held that the administrative exemption applies. *See, e.g., Horne v. Singer Business Machines, Inc.*, 413 F.Supp. 52 (W.D. Tenn. 1976). Yet, the decisions below ignore such precedent. Thus, review by this court is needed to remove the obstacles posed by those decisions to the appropriate application of the administrative exemption.

Inside salespersons in the electrical distribution and the rest of the wholesale-distribution industry are bona fide administrative personnel under the Secretary of Labor's short test for exemption from the overtime requirements of the FLSA. Of this there can be little doubt. The work performed by the wholesaler-distributor inside salesperson is of great import, and has direct bearing upon the general business operations of the wholesaler-distributor. Inside salespersons share the same scope, duty and responsibilities as outside salespersons, with equal responsibilities, judgmental requirements, training, experience, and salaries. Inside salespersons in the wholesale-distribution industry exercise the same discretion and judgment as buyers, representatives and other employees judged exempt by the interpretive regulations of the Department of Labor.[5] To hold that such employees are not exempt from the overtime requirements of the FLSA can only cause substantial economic hardship to this enormous, vital industry.

II. INSIDE SALESPERSONS' RELIANCE ON TELEPHONE USE DOES NOT DIMINISH THEIR FUNCTION BUT INSTEAD PROVIDES GREATER PRODUCTIVITY AND FASTER RESPONSE VIA ADVANCED TECHNOLOGY.

To maintain their marketplace leadership, wholesaler-distributors are continuing to aggressively integrate leading-edge technology into their businesses. Use of this technology is enabling firms to improve productivity and to offer even more tailored, market responsive, value-added services to suppliers and customers. The role of the inside salesperson in utilizing this technology is essential. The inside salesperson is on the cutting edge and technology is the tool of his trade.

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[5] *See, e.g.*, 29 C.F.R. § 541.205(c)(4) (". . . a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments"); 29 C.F.R. §207(d)(2) (". . . a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities . . . buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.")

The fact that inside salespersons concentrate their communications principally through the use of electronic means does not diminish, but actually enhances the quality of such communications by using the most modern technology available. When it was argued in *Goldberg v. Arkansas Best Freight System, Inc.*, 206 F.Supp. 828 (W.D. Ark. 1962), that the duties of two city dispatchers were purely routine and not related to management policies or the general business operations because most of their work was spent on the phone, the court cited *Harrison v. Preston Trucking Company*, 201 F.Supp. 654 (D. Md. 1962) where the *Harrison* court said:

> "the receipt of telephone calls ... was directly and closely related to his primary duties. The mere fact that at times some of these functions might be performed by clerical employees is ... immaterial." *Id.* at 658.

The essence of wholesale-distribution including electrical distribution is sales and service. Customers and suppliers recognize that wholesaler-distributors provide valuable services to them and to the public in general by supplying a vast network of distribution channels. The industry produces economies of scale of such magnitude as to present the best basic groundwork for increases in national productivity. American productivity currently is bounding ahead in only a few key industries, one of which is wholesale trade.[6]

The realities of technology and economics in the wholesale-distribution industry belie any clean parceling of the inside salesperson's position such as found in the decisions below. The lower courts fail to take heed of the fundamental changes that have been occurring in the wholesale-distribution industry for the past twenty years.

The basic change in wholesale-distribution from a historical manufacturer-producer orientation began in the 1970's when there was a growing demand by customers for improved product service which produced a greater emphasis on consumer-oriented operations. The wholesaler-distributor today has a greater concern for meeting the total needs of customers on a systems concept or total package basis. Cost savings and good customer

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[6] Nasar, *America Still Reigns in Services*, Fortune, June 5, 1986 at 65

service (versus outside sales contracts) are the decisive factors that sell customers in today's market. As a result, wholesaler-distributors require higher degrees of competency and training from those persons who deal directly with the customer through modern communications technology.[7]

A route sales mentality does not exist today. As overhead costs have increased and customers have less time to spend with outside salesmen, inside sales has become the accepted and preferred alternative. The inside salesperson handles a greater number of customers without added expense. The outside sales role has become primarily one of public relations and goodwill ambassadorship.

The well-informed, technically-minded inside sales staff handles customer problems concerning equipment or processes and is immediately available to answer questions or solve problems. Studies have shown that inside sales is a way to reach marginal accounts, increase sales and profits and provide better service, clearly a direct involvement in the general business operations of the wholesaler-distributor.[8]

The appellate court properly recognized that the regulations of the Department of Labor "constitute the agency's 'body of experience and informed judgment' " about the FLSA, and therefore should be given "considerable and in some cases decisive weight."[9] It is vital that the weight afforded the regulations be measured under current conditions of business, or, in this instance, the current manner in which modern day wholesale-distribution business is conducted. The regulations are over thirty years old. Although the age of the regulations is not per se an infirmity, it is arguable that considerable technical advances have taken place since then which affect the weight

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[7] Danenburg W., Moncrief R., Taylor W., *Introduction to Wholesale Distribution* (1978)

[8] Armstrong P., *Inside Sales*, Supply House Times, November, 1983 at 178

[9] *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991)(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944))

to be given such regulations.[10]

Consider the interpretation in the regulations of the status of a worker who makes day-to-day determinations as to whether or where to route correspondence:

> "The work of determining whether to answer correspondence personally, call it to his superior's attention or route to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in 541.2." 29 CFR §541.208(d).

The fact that an employee responsible for passing judgment upon the daily mail would be held out as an example of an exempt administrative employee, and yet the inside sales position is found wanting of discretion and independent judgment is incongruous.

A regulation (or an interpretation of a regulation) that does not carry out the will of Congress but operates to create a new rule that is out of harmony with the statute is a mere nullity. Such an interpretation must not only be consistent with the statute but also must be reasonable.[11] The purport of the position of the Department of Labor and the impact of the decisions of the courts below cannot be disguised. They would accomplish precisely what Congress meant to prevent when Congress provided for exemptions from the FLSA. Such a result displays a studied indifference to Congressional intent to actually provide for an administrative exemption for those involved in the general business operations of a company at a critical business level and in an important manner.

III. INSIDE SALESPERSONS WHO PRODUCE SALES MAY BE ADMINISTRATIVELY EXEMPT.

It strains credulity to base the non-exempt status of inside salespersons on the erroneous conclusion that because their work involves sales, inside salespersons are therefore engaged in the production of sales and are not exempt because they are

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[10] *Dalheim v. KDFW-TV*, 706 F.Supp. 493 (N.D. Tex. 1988)

[11] *Manhattan General Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936)

production workers.

The opinions below were based solely on a first prong analysis of the short test for administrative exemption. Both courts depicted the employees as either administrative or productive workers. The critical inquiry was whether the inside salesperson's primary work duty was directly related to the employer's management policies and general business operations or to the production process.

The courts gave great weight to Cooper's stipulation that its primary business purpose is to "produce sales of electrical products." Based upon this statement, the Third Circuit embraced the district court finding that Cooper's inside salespersons "engage in activities relating to the day-to-day 'production' of sales within the plain meaning of the regulation rather than the administrative operation of the business."[12]

Whether an employee is exempt under the FLSA's "administrative" exemption is determined by the employee's actual work activities, not by the nature of the employer's business.[13] By using Cooper's characterization of its business purpose to define the primary duties of individual employers, the lower courts' construction of the Act is inconsistent with its purpose and intent.

Basic statutory law requires that a specific section be read in comity with a surrounding body of work. Reconciling laws with other, similar laws is the best method of interpreting them. Here, however, the courts did not look to the definition of "production" as further described in the FLSA. The Act specifically provides, in detail, a definition of the types of employees engaged in "production." 29 U.S.C.A. 203(j). It is true that "productive" employees as described by the courts are not limited to those engaged in actual physical work on the product itself. However, a relationship to the production of goods must be present. The primary duty of employees engaged in the "indirect production of goods for commerce" must perform work that is

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[12] *Dole v. Cooper*, No. 87-2568, slip op. at 10 (D.N.J. May 17, 1990)

[13] *See, e.g., Mitchell v. H.B. Zachry Co.*, 362 U.S. 310 (1960); *Mitchell v. Household Finance Corporation*, 208 F.2d. 667 (3rd Cir. 1953)

closely related and directly essential to the production process. *See, e.g. A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *Borden Co. v. Borella*, 325 U.S. 679 (1945); *Roland Electrical Co. v. Walling*, 326 U.S. 657 (1946).

There is absolutely no rationale to align the inside sales process with that of production. Sales employees in the service area can be non-exempt, just as employees in production can be. Production includes the administration, planning, management, and control of the various physical processes of production, together with accounting, clerical, and manual activities. All of these employees are engaged in production, yet many of these employees are considered exempt as executives, administrators, or professionals. Neither administration, production, or sales is mutually exclusive, and no employee should be denied exempt status based on a label.[14] The exemption provided white collar employees is not determined by the commercial process involved but instead by a thorough analysis of the responsibilities of the specific position and the requirements of the Department of Labor regulations.

The courts below incorrectly and summarily dismiss inside salespersons as production workers. Notwithstanding that certain non-manufacturing employees may be considered "production" workers, sales positions under the FLSA have never been considered as such. The Department of Labor's own interpretive regulations clearly provide a basis for exemption in 29 CFR §541.207(d)(2) which states that "certain wholesale salesmen . . . who are given reasonable latitude in carrying on negotiations on behalf of their employers" meet the requirement of exercising discretion and independent judgment for exemption as an administrator, thus refuting the finding of the Appellate Court that the work of inside salespersons is not important.

By focusing entirely on the function of inside sales as

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[14] 29 CFR §541.201(b)(2) provides in part: "(2) Many more examples could be cited to show that titles are insufficient as yardsticks...the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities and salary meet all the requirements of the section of the regulations in Subpart A of this part."

'production' in an individual sales organization, the court's analysis overlooks the significance of that function and misapprehends the extent of its impact upon the industry. The determination that Cooper's inside salespersons were production workers overshadowed the considerations of the court and skewed the analysis. The Department of Labor regulations flesh out the character of "administrative" activity as those operations "servicing" a business — such as, advising the management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control. 29 CFR §541.205(b). Contrary to the Department's own interpretive guidelines, the lower courts chose to find that the administrative operations performed by Cooper's inside salespersons — advising the management, negotiating, representing the company and promoting sales — were " 'part and parcel' of the activity of 'producing sales.' "[15]

To take such a position is to deny all chance of administrative exemption in the wholesale-distribution industry since each and every key person in the industry works in a position that produces sales. However, by no stretch of even the most imaginative mind could each of them be considered to be engaged solely in "production" work and therefore not exempt. The Appellate Court discounted the administrative duties of the inside sales position because of its stated conviction (albeit an incorrect one) that the inside salesperson is a production employee. The court argued that if the inside salesperson's "primary responsibility" is to produce sales, any other function would be seen as a secondary responsibility.[16]

The prime function in wholesale-distribution is that of bringing products to market (i.e., sales). If nothing is sold or bought, there is no need for any other functions to be performed. All employees of the wholesaler-distributor are involved in the primary function which is sales. The fallacious reasoning of the Department of Labor and the courts below would take out the

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[15] *Martin v. Cooper Electric Supply*, 940 F.2d 896, 904 (3d Cir. 1991)(quoting *Dole v. Cooper Electric Supply Co.*, No. 87-2568 (D. N.J. May 17. 1990))

[16] *Id.*

exemption for all employees of wholesaler-distributors. Indeed, it would eliminate the exemption for all employees in all businesses. Thus, such a result demonstrates the importance of this case and the need for it to be evaluated by this court.

The FLSA has been in existence since 1938. It gives the Department of Labor broad authority over the pay practices of employers. Since its enactment numerous regulations have been issued interpreting the law. The law has also been amended. It is without doubt a difficult law to understand and has been the basis of many court decisions seeking clarifications. Such clarification is vital here where technology and an ever changing marketplace have evolved the inside sales function in the wholesale-distribution industry into a role totally at odds with the position taken by the Department of Labor and the narrow and strained interpretations by the courts below which ignore current-day business conditions and practices.

Inconsistent and incorrect interpretation of the FLSA by the Department of Labor makes it difficult and at times almost impossible to comply. Fast paced changes in interpretation which do not reflect an accurate evaluation of what is actually occurring in the real business world of wholesale-distribution can be dizzying and costly to employers who find themselves retroactively liable for non-compliance with laws that are interpreted in such a manner as to defeat legislative intent. The Act directs the Department of Labor to write and interpret regulations to provide an administrative exemption. The undesirable result of the decisions below is that the statutory direction to afford an exemption is effectively eliminated in the wholesale-distribution industry. This creates a problem that is crucial not only to the petitioner herein but to the thousands of businesses and their employees who are engaged in the wholesale-distribution business.

It is necessary that any further excursions by the Department of Labor beyond its operative statute be stopped. An amendment by regulation is an unwarranted intrusion upon the legislative sphere.[17] Positive action on the Petition for Writ of Certiorari

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[17] *See, Lubrizol Corporation v. Environmental Protection Agency*, 562 F.2d 807 (1977)

is imperative. This case involves issues that are vital to all employers and employees. It requires a resolution based upon a consideration of business practices as they now exist, and a result which does not summarily dispose of vital factors needed for evaluation by clamping incorrect labels on job functions.

CONCLUSION

For the foregoing reasons, we respectfully submit that petitioner's writ of certiorari be granted.

Respectfully submitted,

LOUIS R. MARCHESE
ROBERT W. BAKER
20 North Wacker Drive
Chicago, IL 60606
(312) 782-1829

Attorneys for Amicus Curiae

Of Counsel

HALFPENNY, HAHN, ROCHE & MARCHESE
20 North Wacker Drive
Chicago, IL 60606